THOMAS C. SHELDON AND ELEANOR SHELDON, HIS WIFE, APPELLANTS, *v.* WILLIAM E. SILL, APPELLEE.

Courts created by statute can have no jurisdiction but such as the statute confers.
Therefore, where the third article of the Constitution of the United States says that the judicial power shall have cognizance over controversies between citizens of different States, but the act of Congress restrains the Circuit Courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, this act of Congress is not inconsistent with the Constitution.
A debt secured by bond and mortgage is a chose in action.
Therefore, where the mortgagor and mortgagee resided in the same State, and the mortgagee assigned the mortgage to the citizen of another State, this assignee could not file his bill for foreclosure in the Circuit Court of the United States.

THIS was an appeal from the Circuit Court of the United States for the District of Michigan, sitting in equity.

The appellee was the complainant in the court below. The bill was filed to procure satisfaction of a bond, executed by the appellant, Thomas C. Sheldon, and secured by a mortgage on lands in Michigan, executed by him and Eleanor his wife, the other appellant. The bond and mortgage were dated on the 1st of November, 1838, and were given by the appellants, then, and ever since, citizens of the State of Michigan, to Eurotas P. Hastings, President of the Bank of Michigan, in trust for the President, Directors, and Company of the Bank of Michigan.

The said Hastings was then and ever since has been a citizen of the State of Michigan, and the Bank of Michigan was a body corporate in the same State.

On the 3d day of January, A. D. 1839, Hastings, President of said bank, under the authority and direction of the Board of Directors, "sold, assigned, and transferred, by deed duly executed under the seal of the bank, and under his own seal, the said bond and mortgage, and the moneys secured thereby, and the estate thereby created," to said Sill, the complainant below, who was then and still is a citizen of New York.

These are all the facts which it is necessary to state, for the purpose of raising the question of jurisdiction.

The Circuit Court decided in favor of the complainant below, and decreed a sale of the mortgaged premises, &c.

From this decree the defendants appealed to this court.

The case was argued by *Mr. Romeyn*, for the appellants, and *Mr. Ashmun* (in a printed argument), for the appellee.

Only so much of the arguments will be given as bear upon the point of jurisdiction.

Mr. Romeyn, for the appellants.

The Circuit Court had no jurisdiction.

The complainant below claimed as assignee from a mortgagee, who was a citizen of the same State with the defendants, the mortgagors.

A bond and mortgage, under the laws of the State of Michigan, and in every court of equity, and by the adjudications of this court, on a bill filed to sell mortgaged property, foreclose the equity of redemption, and collect the debt secured by the mortgage, constitute a chose in action, within the intent and meaning of the eleventh section of the Judiciary Act of 1789.

Before stating the points under this, we beg leave to refer to the case of Dundas et al. *v.* Bowler, 3 McLean, 205. The opinion in that case was repeated by the court as its opinion in this. It asserts that the eleventh section of the Judiciary Act of 1789 "is in conflict with the Constitution"; that the right of a citizen of one State to sue the citizen of another State in the Federal courts, in all cases, is given directly by the Constitution; that Congress may not restrict it; that the converse is "a new and most dangerous principle, and cannot be maintained."

Points under this Proposition.

I. The eleventh section of the Judiciary Act of 1789, inhibiting a suit by an assignee of a chose in action, in cases where the assignor could not have sued, if no assignment had been made, is constitutional; because, the disposal of the judicial power, except in a few special cases, belongs to Congress; and the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant. So, again, it has been decided, that Congress have not delegated the exercise of judicial power to the Circuit Courts, but in certain specific cases. Both the Constitution and an act of Congress must concur in conferring power upon the Circuit Courts. A considerable portion of the judicial power, placed at the disposal of Congress by the Constitution, has been intentionally permitted to lie dormant, by not being called into action by law. The eleventh section of the Judiciary Act of 1789, giving jurisdiction to the Circuit Courts, has not covered the whole ground of the Constitution, and those courts cannot, for instance, issue a mandamus, but in those cases in which it may be necessary to the exercise of their jurisdiction; for, —

1st. This is the settled, practical construction, which, irrespective of express adjudications on this topic, concludes the question.

2d. The point itself has been repeatedly and fully discussed and directly settled, on solemn deliberation, and not "without inquiry as to the validity of the act."

We propose to cite some authorities on these propositions, in the above order; and then to notice the authorities cited in the opinion below.

First. Cases as to practical construction and its effect.

(The counsel then cited a number of cases under this head.)

Second. Cases to show that this principle has been deliberately settled.

The general principle for which we contend is the necessity of legislation to define and vest jurisdiction in the Circuit Court. The opposing principle is, the right and duty of the courts to exercise jurisdiction to the extent of the constitutional limit, by virtue of its provisions and without the authority of Congress. We refer to United States Bank *v.* Deveaux, 5 Cranch, 61; Osborne *v.* Bank of United States, 9 Wheaton, 738; 1 Wash. 235; 7 Cranch, 32; Ibid. 504; 3 Wheat. 336; 12 Pet. 616; also 623, 642; 14 Pet. 75; 2 Howard, 243.

In Turner *v.* Bank of America, 4 Dall. 8, the very question arose, and was decided. Cary *v.* Curtis, 3 Howard, 245; 1 Kent's Commentaries, 513.

(The counsel then reviewed the authorities cited to support the opinion in Dundas *v.* Bowler, and contended that they did not sustain it.)

II. The statute in question should be construed according to the ordinary and usual acceptation of the terms used in it. Because, —

1st. It is constitutional.

2d. If unconstitutional, it should be entirely rejected.

If sustained at all, it should be subjected to the ordinary rules of interpretation.

III. The phrase, "other choses in action," includes the bond and mortgage in this suit. Because, —

1st. The statute was not intended to be confined to negotiable instruments, as is intimated in Dundas *v.* Bowler, 3 McLean, 209. For, —

First. If an instrument not negotiable be assigned, the assignee can sue in equity in his own name, and therefore the reason given in Dundas *v.* Bowler is not sound.

Second. The exception, in the Judiciary Act, of foreign bills of exchange, will leave nothing of consequence for this language to cover, if it be confined to negotiable instruments.

Third. This comprehensive meaning of the clause is a matter of express decision, — decisions which have remained for forty years unquestioned. In Sere *v.* Pitot, 6 Cranch, 332, Chief Justice Marshall decides that promissory notes were not alone in the contemplation of Congress, and that the "intention was to except from the jurisdiction those who could sue by virtue of equitable assignments, as well as those who could do so by virtue of legal assignments." "The term 'other chose in action,' is broad enough to include either case."

2d. The object of the statute was to preserve to the State judicatures the interpretation and enforcement of contracts made between their own citizens; and the general nature of a bond and mortgage, and the fact that they affect the realty of the State, render it particularly proper that they should not be considered out of the statute.

3d. There is greater reason for inhibiting the collection of mortgage debts in the United States courts, by an assignee, than of negotiable instruments, because, in case of the latter, a transfer for the purpose of jurisdiction would defeat the action; while in the case of the former, if the assignment of a mortgage be viewed as the transfer of a title, the consideration cannot be made the subject of inquiry. Briggs *v.* French, 2 Sumner, 252; Smith *v.* Kernochen, 7 Howard, 216.

4th. The statute includes every such right as is ordinarily termed a chose in action; by which is meant, not a right which may be sued for, but one which can be realized only by suit; not a claim to property in specie, which may, if opportunity offer, be exercised by caption or entry, but a right to a debt, or damages, or money which can be recovered only by action. 1 Chitty's R. 99.

A deed of land is not a chose in action. A writer on the *jus mariti*, after informing his readers that the husband might dispose of his wife's choses in action, will hardly need to add that this did not include her "deeds for real estate."

5th. The transferee of a bond and mortgage is usually termed *an assignee*, and therefore is within the act.

We ask an application of the old and familiar rule, that, when words of a fixed legal import are used in a statute, such meaning will be accorded to them in its construction. Chief Justice Marshall applied it to the interpretation of this statute in 6 Cranch, 332, when, referring to the reason why the court, in 4 Cranch, held that an alien administrator might sue when the intestate could not, he said, "The representatives of a deceased person are not usually designated by the term assignee." So Justice Story at the Circuit and this Court, on several occa-

sions, in determining that the bearer of a promissory note could sue when the payee could not, said that the plaintiff's title did not rest upon what was generally and commonly known as an assignment, and that the words of the statute were employed in the ordinary popular professional sense.

6th. Even at law, the mortgage is considered but as a chose in action, and the mortgagor is the real owner.

(The counsel then cited a number of cases to show how a mortgage, even at law, is regarded by the English courts, by American courts generally, and by the Federal courts.)

Douglas, 610; 1 Powell on Mortgages, 109, 110; 4 Kent, 159, 160; 2 Vernon, 401; 2 Jac. & Walk. 194, note; 4 Conn. 235, 424; 6 Conn. 158 to 164; 18 Johns. 114; 4 Kent's Comm. 161, note *a*; 21 Wend. 483; 2 Gallison, 154; 5 Peters, 483; 1 Paine, 534; 9 Wheat. 489.

7th. Whatever be the doctrine at law, in equity a mortgage is styled and treated, in all its relations and for all purposes, as a chose in action. 2 Jac. & Walk. 185; 1 Hopkins, 594; Story's Equity, §§ 1013, 1015, 1016.

8th. If it be conceded that the complainant might have brought ejectment on the mortgage, it would not affect the character of the action. For, —

First. This action can be fully sustained by an informal transfer, or even a simple delivery of the mortgage, without writing; while an ejectment would require a formal, regular transfer, with the solemnity of other deeds of realty, in order to pass the legal estate.

Second. That both proceedings grow out of the same transaction proves nothing; because there may be two remedies for one debt, in one of which the Federal court has jurisdiction, and not in the other.

The indorsee of a note may sue on a direct promise to him by the maker, when he could not sue as indorsee. 5 Howard, 278.

The assignment of the mortgage, without an assignment of the debt, is a nullity. 2 Cowen, 23. While an assignment of the debt carries with it the interest in the land. 2 Gall. 155. In this case, an assignee of the bond alone could not sue on it in this court. This proves that an assignment of the debt will not confer jurisdiction.

If we grant that he could sue in ejectment at law as assignee of the mortgage, the question would still remain, how should he be viewed when suing in equity for his money, and not for the land, and on both the bond and mortgage?

Finally, we ask particular attention to the effect upon the

rights of the mortgagee produced by the statute of Michigan, forbidding him to bring ejectment before foreclosure and sale. How emphatically does it reduce his claim to a chose in action. He has no longer a title, upon which he can even take possession; but, according to the only substantial right ever intended to be secured, a claim for money, and the right to an appropriation of the land by suit to make it. And it is no answer to this, that this law, taking away a remedy, does not bind the Federal court. It is equally high evidence of the doctrines of our State, in relation to the nature of the right of a mortgagee.

The argument of the counsel for the appellee upon the question of jurisdiction was as follows.

With regard to the first point, the objection is based upon the act of Congress, which provides that the Circuit Court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless such suit might have been prosecuted in such court to recover said contents if no assignment had been made, except in cases of a foreign bill of exchange.

The Constitution of the United States (sec. 2 of article 3) says the judicial power shall extend to controversies between citizens of different States, and, in section one of the same article, it says that this judicial power shall be vested in one Supreme Court, and such inferior courts as Congress shall from time to time establish.

Now we would remark, first, that the case before the Circuit Court was a controversy between citizens of different States, and to such a controversy the judicial power of the courts of the United States extends by the Constitution, and by the same Constitution that power is vested, except where the Supreme Court has original jurisdiction by the Constitution, in the inferior courts created by Congress. This judicial power, therefore, to take cognizance of this case, is, by the Constitution, vested in the Circuit Court, and the plaintiff claims the constitutional right to have his controversy with Mr. Sheldon, living in Michigan, decided by that court. Congress has said, by the provision above referred to, that there are certain controversies between citizens of different States which the United States courts shall not take cognizance of; yet the judicial power of the court extends to them by the Constitution, and citizens of the different States have the right to have that power exercised in their controversies. Where does Congress get the power or authority to deprive the courts of the United States of the judicial power with which the Constitution has invested them?

Congress may create the courts, but they are clothed with their powers by the Constitution, and we submit that the provision of the act of Congress materially conflicts with the provisions of the Constitution, and is void. It has been settled, that an act of Congress, enlarging the jurisdiction of the Supreme Court beyond the terms of the Constitution, is void. Marbury *v.* Madison, 1 Cranch, 137. Can it any more take away a constitutional power than it can confer an unconstitutional one? We submit that it cannot. The jurisdiction of this class of controversies is in the Circuit Court. The Constitution makes no such distinction as the act of Congress does, and we respectfully submit, that it is of the utmost importance to citizens of the different States that the whole judicial power granted by the Constitution to the courts of the United States should be exercised. We are aware that in some cases it has been assumed that this act of Congress is valid; but we submit that there has been no decision of this court to that effect, and even if there had, being erroneous, the court would reverse it.

But a mortgage is not a promissory note or chose in action, within the meaning of the provisions of the act of Congress. A mortgage is a conveyance of the fee simple of real estate, liable to be defeated subsequently by payment of money, to secure the payment of which it was made. It is in no sense a chose in action, which is a thing in action, a right of action, a thing recoverable in action, a debt, a demand, a promissory note, a right to recover damages. A chose in action was originally a right of action not assignable at law. It was a cause of suit for a debt due or a wrong. The bond with the mortgage may be a chose in action; but the estate conveyed by the mortgage is not. It is a realty. It is real estate conveyed, and at law the estate is absolute, forfeited, perfect. In equity it may be redeemed; but the estate is nevertheless absolute, and redemption is a matter of favor or equity rather than a legal right. How does this partake of a chose in action? Now what is a foreclosure bill? It is not a suit upon a bond, but a proceeding in law against property, to cut off the equitable right to redeem within a certain period, and to procure a sale of the real estate. It is not a personal action, — seeks no decree against the person, — but simply asks that certain property conveyed to the plaintiff may be sold, and further right to redeem foreclosed. An ejectment lies upon a mortgage, especially after forfeiture; the mortgagee may convey the estate, and ejectment lies in favor of his grantee. Will it be said that his grantee, though living in another State, could not maintain an ejectment in this court to recover the property? Cannot his grantee equally ap-

peal to this court to foreclose the equity to redeem? This point has been directly passed upon in the Circuit Court for the District of Ohio, in the case of Dundas et al. *v.* Bowler and others, reported in the first volume of Western Law Journal, and the decision of the court is sustained by the soundest reasoning. 3 McLean, 205.

Mr. Justice GRIER delivered the opinion of the court.

The only question which it will be necessary to notice in this case is, whether the Circuit Court had jurisdiction.

Sill, the complainant below, a citizen of New York, filed his bill in the Circuit Court of the United States for Michigan, against Sheldon, claiming to recover the amount of a bond and mortgage, which had been assigned to him by Hastings, the President of the Bank of Michigan.

Sheldon, in his answer, among other things, pleaded that "the bond and mortgage in controversy, having been originally given by a citizen of Michigan to another citizen of the same State, and the complainant being assignee of them, the Circuit Court had no jurisdiction."

The eleventh section of the Judiciary Act, which defines the jurisdiction of the Circuit Courts, restrains them from taking "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the contents, if no assignment had been made, except in cases of foreign bills of exchange."

The third article of the Constitution declares that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may, from time to time, ordain and establish." The second section of the same article enumerates the cases and controversies of which the judicial power shall have cognizance, and, among others, it specifies "controversies between citizens of different States."

It has been alleged, that this restriction of the Judiciary Act, with regard to assignees of choses in action, is in conflict with this provision of the Constitution, and therefore void.

It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, — either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdic-

tions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the Circuit Court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this court since its first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed would be tedious and unnecessary.

In the case of Turner *v.* Bank of North America, 4 Dall. 10, it was contended, as in this case, that, as it was a controversy between citizens of different States, the Constitution gave the plaintiff a right to sue in the Circuit Court, notwithstanding he was an assignee within the restriction of the eleventh section of the Judiciary Act. But the court said, — "The political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress: and Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject, in every form which the Constitution might warrant." This decision was made in 1799; since that time, the same doctrine has been frequently asserted by this court, as may be seen in McIntire *v.* Wood, 7 Cranch, 506; Kendall *v.* United States, 12 Peters, 616; Cary *v.* Curtis, 3 Howard, 245.

The only remaining inquiry is, whether the complainant in this case is the assignee of a "chose in action," within the meaning of the statute. The term "chose in action" is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action.

It is true, a deed or title for land does not come within this description. And it is true, also, that a mortgagee may avail himself of his legal title to recover in ejectment, in a court of law. Yet, even there, he is considered as having but a chattel

interest, while the mortgagor is treated as the true owner. The land will descend to the heir of the mortgagor. His widow will be entitled to dower. But on the death of the mortgagee, the debt secured by the mortgage will be assets in the hands of his executor, and although the technical legal estate may descend to his heir, it can be used only for the purpose of obtaining satisfaction of the debt. The heir will be but a trustee for the executor.

In equity, the debt or bond is treated as the principal, and the mortgage as the incident. It passes by the assignment or transfer of the bond, and is discharged by its payment. It is, in fact, but a special security, or lien on the property mortgaged. The remedy obtained on it in a court of equity is not the recovery of land, but the satisfaction of the debt. It is the pursuit by action of one debt on two instruments or securities, the one general the other special. The decree is, that the mortgaged premises be sold to pay the debt, and if insufficient for that purpose, that the complainant have further remedy, by execution, for the balance.

The complainant in this case is the purchaser and assignee of a sum of money, a debt, a chose in action, not of a tract of land. He seeks to recover by this action a debt assigned to him. He is therefore the "assignee of a chose in action," within the letter and spirit of the act of Congress under consideration, and cannot support this action in the Circuit Court of the United States, where his assignor could not.

The judgment of the Circuit Court must therefore be reversed, for want of jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Michigan, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that this cause be, and the same is hereby, reversed, for the want of jurisdiction in that court, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to dismiss the bill of complaint for the want of jurisdiction.